

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Arizona Public Service Company and
Sequent Energy Management, L.P.**

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Docket No. PR10-45-000

**MOTION TO INTERVENE OUT-OF-TIME AND REQUEST FOR REHEARING OF
THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA,
THE NATURAL GAS SUPPLY ASSOCIATION, AND
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Section 19(a) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(a), and Rules 212, 214, 713, and 2007 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.214, 385.713, and 385.2007 (2010), the Independent Petroleum Association of America (“IPAA”), the Natural Gas Supply Association (“NGSA”), and the Electric Power Supply Association (“EPSA”) (collectively, the “Associations”) hereby request rehearing of the Commission’s Order Denying Request For Clarification And Granting Limited Waiver issued on July 23, 2010 in the above-captioned proceeding (“July 23 Order”).¹

The July 23 Order granted a waiver of the buy/sell prohibition in order to allow a transaction between the Arizona Public Service Company (“APS”) and Sequent Energy Management, L.P. (“Sequent”) to proceed. However, the July 23 Order also expanded the scope of the prohibition against buy/sell transactions to encompass transactions involving Hinshaw and Natural Gas Policy Act of 1978 (“NGPA”) Section 311 pipelines. The Associations do not wish to disturb the waiver granted by the Commission for the specific transaction between APS and

¹ *Arizona Public Service Company et al.*, Order Denying Request For Clarification And Granting Limited Waiver, 132 FERC ¶ 61,064 (2010).

Sequent. However, in expanding the scope of the buy/sell prohibition, the July 23 Order brought a sudden policy change that could have significant implications for intrastate pipeline service. The July 23 Order is not consistent with prior Commission precedent. Prior to the July 23 Order, it was clear that buy/sell transactions involving non-interstate capacity were not prohibited transactions. Further, the July 23 Order expanded the scope of the buy/sell prohibition based on an alleged potential for discrimination. However, the order failed to establish any record or point to any evidence of discrimination. Furthermore, the Commission did not consider the July 23 Order's potential impact on consumers nor did it address any compliance issues or any viable alternatives to prohibited transactions. Therefore, the Commission should grant rehearing of the July 23 Order with regard to the expansion of the scope of the buy/sell prohibition.

I. BACKGROUND

In Order No. 636,² the Commission created the capacity release program for interstate pipelines and adopted the prohibition on buy/sell transactions and in Order No. 636-B, the Commission specifically exempted intrastate pipelines from the requirements of Order No. 636.³ The Commission never required intrastate pipelines to introduce all the features of open-access service that are required of interstate pipelines, finding such requirements to be unduly burdensome on intrastate pipelines.⁴

² *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 59 FERC ¶ 61,030, 57 Fed. Reg. 13,267 (Apr. 8, 1992) (“Order No. 636”), *order on reh’g*, Order No. 636-A, 60 FERC ¶ 61,102, 57 Fed. Reg. 36,128 (Aug. 3, 1992); *order on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992) (“Order No. 636-B”), *reh’g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *aff’d in part and remanded in part sub. nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *cert. denied*, *Associated Gas Dist. v. FERC*, 117 S.Ct. 1723 (1997); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997); *order on reh’g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998)

³ *See* Order No. 636-B, 61 FERC ¶61,272, footnote 26 (“Order No. 636 applies only to pipelines operating under Part 284, except that it does not apply to intrastate pipelines”).

⁴ *See EPGT Texas Pipeline, L.P.*, 99 FERC ¶61,295 at p. 62,252 (2002); *order on reh’g* 106 FERC ¶ 61,184 (2004); *order on reh’g* 109 FERC ¶ 61,350 (2004); *order on reconsideration* 117 FERC ¶ 61, 025 (2006).

On June 25, 2010, APS and Sequent (collectively, “Petitioners”) submitted a joint petition (“June 25 Petition”)⁵ seeking clarification that a proposed agreement described in their petition is not a prohibited buy/sell transaction under the Commission’s capacity release rules, regulations and policies. The transaction pertains to natural gas storage on a Hinshaw facility, which is an intrastate pipeline facility that is not required to comply with the Commission’s capacity release rules promulgated under Order No. 636. Alternatively, if the Commission determines that the proposed agreement is a prohibited buy/sell transaction, Petitioners requested a limited waiver of the Commission’s capacity release rules. On July 23, 2010, the Commission issued the instant order denying Petitioners request for clarification, but finding that good cause exists to grant Petitioners’ request for a limited waiver of the Commission’s buy/sell prohibition in order to allow the proposed transaction to proceed. In so doing, the Commission also expanded the scope of the prohibition against buy/sells to encompass transactions involving Hinshaw and NGPA Section 311 pipelines.

II. MOTION TO INTERVENE OUT-OF-TIME

A. Identity of The Associations

IPAA represents thousands of American independent oil and natural gas producers and associated service companies. Independent producers drill 90 percent of the wells in the United States and produce approximately 82 percent of the nation’s natural gas and over 68 percent of the country’s domestic crude oil supply (well above that amount in the Lower-48 states). IPAA members ship natural gas on hundreds of pipelines throughout the United States and the result of this proceeding will have a significant impact on IPAA.

⁵ *Arizona Public Service Company et al.*, Joint Petition of Arizona Public Service Company And Sequent Energy Management, L.P. For Confirming Clarification, or in The Alternative, Request For Limited Waiver And Expedited Consideration, Docket No. PR10-45-000 (June 25, 2010).

NGSA is a trade association which represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. customers. NGSA members transport natural gas through most interstate natural gas pipeline systems and the result of this proceeding will have a significant impact on NGSA.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities. EPSA seeks to bring the benefits of competition to all power customers.⁶ Nearly a quarter of the electricity generated in the United States is fueled by natural gas, and therefore electricity suppliers purchase or procure natural gas for their generation and are directly impacted by changes in the uses and costs of interstate and non-interstate pipeline capacity. This proceeding has an impact on the delivery of natural gas to produce electricity when needed, on the electricity markets generally and the cost of electricity to consumers.

⁶ This request for rehearing represents the position of EPSA as an organization, but not necessarily the view of any particular member with respect to any specific issue.

B. Communications

Any communications with respect to this pleading and this proceeding should be addressed to:

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C. Motion To Intervene Out-of-Time

The Associations are interested in and affected by the results of the July 23 Order. The Associations’ interest, as representing the interests of several consumers, is stated in and protected by Rule 214(b)(2)(ii)(A).⁸

In considering motions for late intervention under the standards of Rule 214(d),⁹ the Commission considers “whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant’s interest is

⁷ Due to the joint nature of this motion, the Associations respectfully request a waiver of the requirements of Section 385.203 of the Commission’s regulations to allow the inclusion of more than two persons on the service list in this proceeding.

⁸ 18 C.F.R. 385.214(b)(2)(ii)(A) (2010).

⁹ 18 C.F.R. 385.214(d) (2010).

adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention.”¹⁰

The Associations have good cause for intervening out of time. As mentioned above, the July 23 Order expanded the scope of the prohibition against buy/sells to encompass transactions involving Hinshaw and NGPA Section 311 pipelines. The July 23 Order represented the first instance where the Commission announced that its prohibition against buy/sell arrangements extended to transportation by intrastate pipelines. At the time that Petitioners submitted the June 25 Petition, the Associations did not have an interest in the issue of whether any particular proposed transaction between Petitioners may or may not be a prohibited buy/sell transaction. However, in expanding the scope of the prohibition against buy/sell transactions to encompass transactions involving Hinshaw and NGPA Section 311 pipelines, the July 23 Order raised issues of broader implications for natural gas shippers that do business on Hinshaw and NGPA Section 311 pipelines.

The members of the Associations ship natural gas on hundreds of pipelines throughout the United States and the Commission’s determination that the prohibition against buy/sells applies to Hinshaw and NGPA Section 311 pipelines created significant concerns for the Associations. As this proceeding has generic implications on national policy, the Associations have a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party. Broad application of changes that appear to have been made in this discrete proceeding with respect to buy/sell transactions on intrastate pipelines could result in significant cost increases, and impact the availability of natural gas supplies.

¹⁰ *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 30 (2006).

Additionally, no disruption would result from the grant of this motion as to the waiver granted to APS and Sequent in the July 23 Order. However, since the order also raised generic issues regarding the application of the buy/sell prohibition, these issues must be addressed in a comprehensive manner with participation and input from impacted industry participants. Further, the Associations' interests cannot be adequately represented or protected by other parties and no prejudice or burden on existing parties will result from allowing the Associations to intervene. Furthermore, the Associations accept the record as it stands in this proceeding. Therefore, the Associations should be granted permission to intervene in the instant proceeding.

III. REQUEST FOR REHEARING

A. Statement of Issues / Specification of Errors

1. Whether it was error and abuse of discretion for the Commission to expand the buy/sell prohibition to non-interstate pipelines without considering established Commission precedent that the prohibition on buy/sell transactions is a feature of the capacity release program on interstate natural gas pipelines. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983). *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578 (D.C.Cir. 1979). *Public Service Commission v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980). *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273 (D.C. Cir. 2001). *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997). *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, (1971). *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 59 FERC ¶ 61,030, 57 Fed. Reg. 13,267 (Apr. 8, 1992) ("Order No. 636"), *order on reh'g*, Order No. 636-A, 60 FERC ¶ 61,102, 57 Fed. Reg. 36,128 (Aug. 3, 1992); *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992) ("Order No. 636-B"), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993), *aff'd in part and remanded in part sub. nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) ("*United Distribution Cos.*"), *cert. denied*, *Associated Gas Dist. v. FERC*, 117 S.Ct. 1723 (1997); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997); *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998). *EPGT Texas Pipeline, L.P.*, 99 FERC ¶61,295 (2002); *order on reh'g* 106 FERC ¶ 61,184 (2004); *order on reh'g* 109 FERC ¶ 61,350 (2004); *order on reconsideration* 117 FERC ¶ 61,025 (2006).

2. Whether it was error and abuse of discretion for the Commission to expand the prohibition on buy/sell transactions to non-interstate pipelines on the basis of discrimination concerns, without a record indicating discrimination issues. *National Fuel Gas Supply Corporation v. FERC*, 468 F. 3d 831 (D.C. Cir. 2006).

3. Whether it was error and abuse of discretion for the Commission to expand the prohibition on buy/sell transactions to non-interstate pipelines without a record considering and addressing the potential effect, results, and impacts of the expansion. Administrative Procedure Act, 5 U.S.C. § 706 (2009). *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. 29 (1983). *Burlington Truck Lines*, 371 U.S. 156 (1962). *ChevronTexaco Exploration and Production Co. v. FERC*, 387 F.3d 892 (D.C. Cir. 2004). *East Texas Elec. Coop, Inc. v. FERC*, 218 F.3d 750 (D.C. Cir. 2000). *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987). *General Elec. Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

B. Arguments In Support of Request For Rehearing

The Associations take no position regarding the Commission's determination to grant Petitioners permission to allow the transaction outlined in their petition, and do not intend to upset the certainty of the waiver granted by the Commission to APS and Sequent. Rather, the Associations' sole focus in this request for rehearing is the Commission's determination that the prohibition against buy/sell transactions now applies to Hinshaw and NGPA Section 311 pipelines.

1. The Application of the Buy/Sell Prohibition to Non-Interstate Pipelines is Not Consistent With Relevant Commission Precedent

In the July 23 Order, the Commission stated that it "has not previously addressed – whether the prohibition on buy/sell transactions applies to interstate open-access transportation services provided by (1) intrastate pipelines pursuant to section 311 of the [NGPA] and (2) Hinshaw pipelines pursuant to blanket certificates issued under section 284.224 of the Commission's regulations."¹¹ Therefore, the July 23 Order was the first instance in which the Commission has ruled that the buy/sell prohibition applies to transactions on non-interstate pipelines. This finding conflicts with prior Commission pronouncements on this issue since the establishment of the buy/sell prohibition in Order No. 636. Prior Commission precedent indicates that the buy/sell prohibition is a consequence of the capacity release programs on

¹¹ July 23 Order at P 12 (footnotes omitted).

interstate natural gas pipelines. Therefore, reasoned decision-making requires the Commission to consider this time-honored precedent when announcing a new policy.¹² If the Commission decides to change its course on this issue, it must “supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”¹³ However, the July 23 Order failed to consider relevant precedent and announced a change of course without reasoned decision-making or notice to and participation by affected market participants.

According to the July 23 Order, the prohibition on buy/sell transactions plays “a more fundamental role than just preventing the circumvention of the capacity release program.”¹⁴ However, the Commission failed to mention any authority or precedent that supports this statement. The prohibition on buy/sell transactions has been in existence for approximately 18 years and there is a vast body of law built around it. If this prohibition was meant to exist independently of the capacity release program, there should have been some indication to that effect in this body of law.

In fact, the Commission’s precedent on this issue has repeatedly suggested that the buy/sell prohibition is required to prevent the circumvention of capacity release rules on

¹² See *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 586 n.31 (D.C. Cir. 1979) (the Commission “bears the burden of explaining the reasonableness of any departure from a long standing practice, and any facts underlying its explanation must be supported by substantial evidence”); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) (“it is axiomatic that [agency action] must either be consistent with prior [action] or offer a reasoned basis for its departure from precedent.” (quoting *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1443 (D.C. Cir. 1997))); see also *Public Service Commission v. FERC*, 642 F.2d 1335, 1346 (D.C. Cir. 1980).

¹³ *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (per curiam) (internal citations and quotation marks omitted); see *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”) (internal quotation marks omitted).

¹⁴ July 23 Order at P 16.

interstate pipelines.¹⁵ For example, Order No. 636 clearly tied the buy/sell prohibition to the capacity release issue on interstate pipelines, stating that “[a]fter a pipeline’s capacity releasing mechanism goes into effect, no new buy/sell deals may be executed after that date and thereafter all allocations of interstate pipeline capacity must be done under the capacity releasing mechanism.”¹⁶ When the Commission imposed a shipper-must-have-title requirement, it was to ensure that beneficial use of capacity was not transferred except in accordance with capacity release rules.¹⁷ Similarly, when the Commission imposed the prohibition against buy/sell arrangements, it was to guard against the circumvention of the capacity release rules.¹⁸

Additionally, the Commission has previously stated that it has “never required intrastate pipelines to introduce all the features of open-access service that [are] required of interstate pipelines.”¹⁹ The Commission found that one of the purposes “of the [NGPA] was to induce intrastate pipelines to participate in the interstate pipeline grid by ensuring that it would not be burdensome to do so.”²⁰ The Commission found that “[t]his participation . . . eliminates the need for duplication of facilities between interstate and intrastate pipelines [and] that requiring

¹⁵ See, e.g., *El Paso Natural Gas Co., et al.*, 59 FERC ¶ 61,031 at p. 61,080 (1992) (“To allow any new buy/sell arrangements to be negotiated totally outside the capacity release mechanism . . . would provide a major loophole [to the capacity release program], potentially inviting substantial circumvention of the capacity release mechanism.”) (“*El Paso*”); *BP Energy Co.*, 121 FERC ¶ 61,088 at P 14 (2007) (finding that buy/sell transactions are “an obstacle to the success of the capacity release program”) (“*BP Energy*”).

¹⁶ Order No. 636 at pp. 30,416-417.

¹⁷ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, 65 Fed. Reg. 10,156 (2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶31,091, at p. 31,300 (February 9, 2000) (explaining all of “the capacity release rules were designed with [the shipper-must-have-title] policy as their foundation,” since without this requirement “capacity holders could simply transport gas over the pipeline for another entity.”); *order on reh’g*, Order No. 637-A, 65 Fed. Reg. 35,706 (2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶31,099 (May 19, 2000); *order on reh’g*, Order No. 637-B, 65 Fed. Reg. 47,284 (2000), *affirmed in relevant part*, *INGAA v. FERC*, 285 F.3d 18 (D.C. Cir. 2002).

¹⁸ Order No. 636 at 30,416-417.

¹⁹ *EPGT Texas Pipeline, L.P.*, 99 FERC ¶61,295 at p. 62,252 (2002); *order on reh’g* 106 FERC ¶ 61,184 (2004); *order on reh’g* 109 FERC ¶ 61,350 (2004); *order on reconsideration* 117 FERC ¶ 61,025 (2006).

²⁰ *Id.*

intrastate pipelines to comply with all the requirements applicable to interstate pipelines could make it unduly burdensome to participate in interstate markets, contrary to the intent of the NGPA.”²¹ The Commission clearly aimed at minimizing any concerns that these pipelines may eventually be considered interstate pipelines.²² Specifically, in Order No. 636-B, the Commission expressly exempted intrastate pipelines from the requirements of Order No. 636.²³ Further, the Commission did not subject transactions under NGPA Section 311 to Order No. 636 restructuring requirements,²⁴ capacity release requirements, or shipper-must-have-title requirements.²⁵ Until the July 23 Order, it was clear that buy/sell transactions involving non-interstate capacity were not prohibited transactions. Contrary to the purposes of the NGPA, the July 23 Order created an unnecessary barrier to commerce on non-interstate pipelines.

In *El Paso*,²⁶ the Commission clarified the connection between the capacity release program and the buy/sell prohibition. The Commission stated that buy/sell transactions would be prohibited because of “*the threat they impose on the success of the uniform, national capacity release program established under Order No. 636.*”²⁷ On appeal, the D.C. Circuit affirmed that “the bar to buy/sells applies to all firm capacity that is *subject to the Order No. 636 capacity*

²¹ *Id* (footnote omitted).

²² *See* Order No. 436, FERC Stats. and Regs. Regulations Preambles 1982-1985 ¶ 30,665 at p. 31,502.

²³ *See* Order No. 636-B, 61 FERC ¶61,272, footnote 26 (“Order No. 636 applies only to pipelines operating under Part 284, except that it does not apply to intrastate pipelines”).

²⁴ Order No. 63, 45 Fed. Reg. 1872, FERC Statutes and Regulations, Regulations Preambles ¶ 30,118 (1980). Order No. 63 promulgated Section 284.224 of the Commission’s regulations, which grants a limited-jurisdiction blanket certificate under Section 7(c) of the NGA for local distribution companies and Hinshaw pipelines to provide transportation services in the same manner as intrastate pipelines under Section 311 of the NGPA and subpart B of the Commission’s regulations. The term “Section 311-type service” refers to transportation service provided by Hinshaws pursuant to Section 284.224 of the Commission’s regulations and intrastate pipelines pursuant to Section 311 of the NGPA.

²⁵ Order No. 636 at p. 30,407, n.89.

²⁶ *El Paso*, 59 FERC ¶ 61,031 (“*El Paso*”), *reh’g denied*, 60 FERC ¶ 61,117 (1992).

²⁷ *El Paso*, 60 FERC at p. 61,385 (emphasis added).

release program.”²⁸ Additionally, the Commission has used numerous occasions to further clarify that a prohibited buy/sell transaction is “a commercial arrangement where a shipper holding *interstate pipeline capacity* buys gas at the direction of, on behalf of, or directly from another entity . . . ships that gas through its *interstate pipeline capacity*, and then resells an equivalent quantity of gas to the downstream entity at the delivery point.”²⁹

Therefore, the July 23 Order constitutes a policy change requiring a reasoned analysis of prior policy as embodied in numerous Commission decisions. The July 23 Order’s failure to include such analysis constituted error and abuse of discretion.

2. The July 23 Order Failed to Establish a Record Justifying the Expansion of the Buy/Sell Prohibition to Non-Interstate Pipelines Based on Discrimination Issues

The July 23 Order states that, if the buy/sell prohibition did not apply, this would create a “*potential* for discrimination.”³⁰ However, the July 23 Order failed to establish a record establishing the existence of discrimination. As the D.C. Circuit stated, “[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is *in fact* an industry problem is not reasoned decision-making.”³¹ The July 23 Order failed to

²⁸ *United Distribution Cos.*, 88 F.3d at 1155, n. 69 (emphasis altered). Order No. 636 and *El Paso* were consolidated for purposes of the appeal before the DC Circuit. *See id.* at 1127, n.19.

²⁹ *See, e.g., Noble Energy, Inc., et al.*, 130 FERC ¶ 61,175 at P 12 (2010) (“*Noble Energy*”) (emphasis added); *accord Southern Company Services, Inc.* 128 FERC ¶ 61,013 at P 5 (2009) (“*Southern Company*”); *ProLiance Energy, LLC*, 127 FERC ¶ 61,321 at P 9 (2009); *Sequent Energy Management, L.P. et al.*, 127 FERC ¶ 61,320 at P 12 (2009); *Constellation NewEnergy – Gas Division, LLC*, 122 FERC ¶ 61,220 at P 14 (2008) (“*Constellation-New Energy*”); *BP Energy*, 121 FERC ¶ 61,088 at p 14 (2007) (all citing *Williams Energy Marketing & Trading Company*, 92 FERC ¶ 61,219, at p. 61,715-16 (2000)).

³⁰ July 23 Order at P 18 (emphasis added). *See also id.* at P 19.

³¹ *National Fuel Gas Supply Corporation v. FERC*, 468 F.3d at 845 (D.C. Cir. 2006) (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)) (emphasis added). Under the Administrative Procedure Act (“APA”), an agency’s decision may not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The “arbitrary and capricious” standard of review ensures that an agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

demonstrate that discrimination issues existed warranting the expansion of the buy/sell prohibition. In contrast to the July 23 Order, Order No. 636 was adopted after an extensive rulemaking proceeding that provided industry participants with opportunities to comment on the proposed policy change³² and provided the Commission with opportunities to address industry concerns and develop a record on related issues.³³ Unfortunately, in the case of the July 23 Order, the record is barren of any industry input and consists entirely of one specific transaction between two parties and attracting the attention of only one intervenor.³⁴

Therefore, the July 23 Order does not constitute reasoned decision-making and rehearing should be granted. If the Commission wishes to address any issues with regard to the secondary market of capacity on non-interstate pipelines, the Commission should initiate a notice of inquiry proceeding to examine any available options and their implications.³⁵

3. The July 23 Order Failed to Establish a Record Addressing Its Potential Effects

The July 23 Order did not consider its potential effect, results, and impacts on shippers. The Commission should consider whether expanding the buy/sell prohibition would negatively impact the efficient use of non-interstate pipeline capacity. For example, the July 23 Order did not consider any potential uncertainty that may result from the expansion of the buy/sell prohibition.³⁶

³² *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations*, 56 Fed. Reg. 38,372 (August 13, 1991), FERC Stats. & Regs. ¶ 32,880.

³³ *See* Order No. 636 at pp. 30,416-417; *El Paso*, 59 FERC ¶ 61,031 at p. 61,073.

³⁴ *See* (doc-less) Motion to Intervene of Calpine Corporation, Docket No. PR10-45-000 (July 7, 2010).

³⁵ *See, e.g., Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271 (2008).

³⁶ *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines*, 371 U.S. 156, 168 (1962) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including (continued...)

The July 23 Order contained no discussion of how the expansion of the buy/sell prohibition could affect any transactions that may exist. In contrast to the July 23 Order, in Order No. 636, the Commission stated that it did “not intend to disrupt any ongoing relationships established through ‘buy/sell transactions’ established on the basis of current Commission policy”³⁷ and specifically grandfathered existing buy/sell transactions.³⁸ Also, the July 23 Order failed to address the potential cost and burden that may be associated with unwinding and discontinuing any transactions that may exist.³⁹

Further, under the July 23 Order, whenever excess capacity is transacted on a non-interstate pipeline, the parties must apply to the Commission for a waiver. However, this system may not be workable for any real or potential short term, quick-start, or market-driven buy/sell transactions.

Therefore, it was error and abuse of discretion for the Commission to expand the prohibition on buy/sell transactions without a record addressing the potential results of this expansion. The July 23 Order does not constitute reasoned decision-making and rehearing should be granted.

(...continued)

a ‘rational connection between the facts found and the choice made.’”); *see also ChevronTexaco Exploration and Production Co. v. FERC*, 387 F.3d 892, 895 (D.C. Cir. 2004).

³⁷ *El Paso Natural Gas Co.*, 56 FERC ¶ 61,289, at 62,133 (1991); *Transwestern Pipeline Co.*, 56 FERC ¶ 61,288, at 62,120 (1991).

³⁸ *El Paso*, 59 FERC ¶ at p. 61,080.

³⁹ *See East Texas Elec. Coop, Inc. v. FERC*, 218 F.3d 750, 754 (D.C. Cir. 2000) (“We have consistently rejected agency efforts to bind parties by what the agency intended, but failed to communicate.”); *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“An agency fails to provide fair notice if the regulations and other public statements issued by the agency” are so unclear that regulated entities are unable to identify, “with ascertainable certainty, the standards with which the agency expects parties to conform.”).

IV. CONCLUSION

Wherefore, for the foregoing reasons, the Associations respectfully request that the Commission grant their motion to intervene out of time and their request for rehearing as explained above.

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Dated: August 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Commission Secretary in these proceedings.

Dated at Washington, DC this 23rd day of August, 2010.

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